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No. 92-1988

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TICOR TITLE INSURANCE COMPANY, *et al.*
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT, *et al.*
Respondents.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' MOTION TO DEFER BRIEFING AND ARGUMENT

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Respondents Walter Thomas Brown and Jeffrey L. Dziewit, representatives of a putative class of Arizona and Wisconsin residents, respectfully move this Court to defer the briefing and argument on the petition in the above-captioned case as set forth in the Court's order dated October 4, 1993.

On October 1, 1993, counsel for the Petitioners and Respondents wrote to the Clerk of the Court and advised the Court that a settlement had been reached by the parties. A copy of the parties' letter to the Court is attached hereto as Exhibit A. As stated in the parties letter, "the settlement reached by the parties is intended to moot the petition." Because the case was filed as a class action, the parties requested that the Court defer action on the then-pending petition until completion of the notice and approval required by Rule 23 in the District Court. See Exhibit A. Immediately upon learning that the Court had granted ceriorari, counsel for the undersigned contacted the Assistant Clerk of the Court and was advised that the Court had not been apprised of the parties' letter prior to granting the petition.

The parties' counsel have consulted regarding the proper procedure to be followed at this juncture, and have not been able to agree on how to proceed. Counsel for Petitioners suggested that the briefing on the petition go forward as scheduled while the parties seek expeditiously to implement the settlement in the District Court. Counsel for Respondents do not believe this is an appropriate procedure. Rather, the procedure followed by this

Court in Charles Henson v. East Lincoln Township, U.S. Supreme Court No. 87-5461, seems to be the only proper course. In that case, we are advised that the Court deferred briefing and oral argument while the parties sought to complete the settlement. Respondents believe that procedure -- deferral of the briefing and argument pending completion of settlement procedures in the District Court -- should be adopted by this Court in this case.

The parties expect to submit a final settlement agreement forthwith. It is reasonably anticipated that all proceedings in the District Court, including notice and approval, can be completed within 120 to 180 days.

Given the existence of a settlement, a copy of which is attached hereto as Exhibit B, there is no case or controversy to be resolved by the Court. The only possibility that the Court would have to entertain the petition would arise in the event that the District Court, after a fairness hearing, does not approve the settlement, orders a form of notice materially more expensive than the form of notice agreed to by the parties, or if an extremely large number of class members seek to opt out of the settlement. None of these events are likely. The course suggested by Petitioners' counsel, which would involve proceeding with the briefing and argument of the petition, would be anomolous in light of the parties' obligation to proceed expeditiously to complete their settlement.

For the foregoing reasons, Respondents respectfully submit that the Court should defer the briefing schedule set forth in its October 4, 1993 order for 120 days which should allow adequate time for the parties to complete the proceedings in the District Court or, in the unlikely event those proceedings have not yet concluded, for the parties to request a brief additional extension of the briefing schedule should that be necessary.

RESPECTFULLY SUBMITTED this 13th day of October, 1993.

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October 1, 1993

BY HAND

Frank Lorson
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: No. 92-1988, Ticor Title Insurance Co. v. Brown

Dear Mr. Lorson:

We are writing to request that the Court defer any action with respect to the petition for certiorari in the above-captioned case to allow the lower court to consider a settlement just reached by the parties. The petition was filed on June 15, 1993, an opposition was filed on July 15, and a reply to the opposition was filed on July 30, 1993. As of this date, the Court has not announced its ruling on the petition.

The reason for our request is that the settlement reached by the parties is intended to moot the petition. Because the case has been filed as a class action, however, Rule 23, Fed. R. Civ. Proc., requires that the settlement be approved by the court, after notice and a fairness hearing. Counsel for the parties will seek to implement this approval expeditiously and will advise the Court of any developments. If the settlement is approved, of course, the petition will be withdrawn.

Thank you for your attention to this matter.

Sincerely,

Joel I. Klein
Counsel of Record for
the Petitioners

Gerald D. W. North
Counsel of Record for
the Respondents

JIK:jac

EXHIBIT A

MEMORANDUM OF UNDERSTANDING

This memorandum summarizes the understandings reached with respect to the settlement of Brown v. Ticor Title Insurance Co., D.C. (Arizona) No. CV-90-0577-PHX-SMM, filed April 13, 1990, by the plaintiffs and defendants.

1. The settlement class will be defined to include purchasers of "title search and examination services" in Arizona and Wisconsin from all title insurers and their agents.

2. The settlement class will include persons who purchased "title search and examination services" in Wisconsin in 1981 through 1984 and in Arizona in 1981 and 1982.

3. The defendants believe that members of the settlement class and their addresses cannot be identified with reasonable effort through the business records of the defendants and that notice of the settlement by publication is the best notice practicable. The defendants agree to make available a reasonably representative sampling of their business records to allow the attorneys for the plaintiffs to confirm that notice by publication is the best notice practicable. Assuming subsequent agreement on this issue, notice of the settlement and of its benefits will be by publication in a manner and form to be subsequently agreed upon. Should the Court order notice in any form or manner that is substantially more expensive than that which the plaintiffs and defendants agree to recommend, the defendants may, at their option, terminate the settlement.

4. Class members may opt out of the settlement. However, defendants may reject the settlement if 5000 or more class members elect to opt out.

5. Members of the settlement class who purchased from one of the six defendants or their agents will be entitled to elect a cash option in the manner and in the amount described below. Those class members who purchased from one of the defendants or their agents who do not receive the cash option ("non-cash option class members") shall be entitled to receive the policy enhancement described below and the benefit described in paragraph 6.

6. Members of the settlement class who purchased from title insurers other than the six defendants or their agents will be provided the last $5,000 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants with respect to property located either in

EXHIBIT B

Arizona or Wisconsin within a one year period following the date that this settlement results in a final judgment order.

7. This settlement shall be without an admission of liability on the part of any of the defendants and shall result in a judgment dismissing all claims of the settlement class under federal and state antitrust laws with prejudice as to the six defendants, their respective agents, officers and employees. It shall be without prejudice to the claims of the settlement class as to any others.

8. It is agreed and understood that certain language and provisions of the Final Order and Judgment of June 10, 1986 in MDL 633 relating to the mechanics of the settlement, the benefits to the settlement class and the jurisdiction of the Court shall be made applicable herein as subsequently agreed upon.

9. The defendants shall pay such attorneys fees and costs as are subsequently agreed upon and approved by the Court. If the parties are unable to agree on the amount of attorney fees and costs the issue will be submitted to the Court for decision. In addition, the defendants shall pay the administrative costs of the settlement, including the cost of notice.

10. It is agreed and understood that regulatory approval may be necessary with respect to the provision of certain of the settlement benefits which are the subject of this understanding. The defendants agree that they will in good faith endeavor to secure any such regulatory approvals. In the event regulatory approval is conditioned upon material changes in the settlement benefits conferred herein or in any financial undertakings required of the defendants, the parties in good faith shall endeavor to negotiate comparable alternative benefits.

11. A member of the settlement class entitled to elect the cash option as provided above shall do so in the following manner:

a. submit a claim form within a 150 day period following final approval of the settlement or final publication, whichever is later;

b. the claim form shall include identification of the claimant by name and address as well as identification of the date of purchase, the identity of the title insurer or agent from whom purchased and some verification that the claimant received hese services from that title insurer or agent;

c. a mechanism will be subsequently agreed upon to review these claim forms to allow the claim to be accepted or rejected;

d. those claimants whose claim is approved shall be entitled to the cash amount described below.

12. In Wisconsin, each class member whose cash election is approved shall be entitled to receive $10.90 but in no event shall the total liability of the six defendants in this respect exceed $1,587,326. In Arizona, each class member whose cash election is approved shall be entitled to receive $10.21 but in no event shall the total liability of the six defendants in this respect exceed $1,225,200. In the event the total claims in either state exceed the respective maximum liabilities set forth above, the individual cash payment to each claimant shall be reduced proportionally.

13. Those members of the settlement class entitled to elect the cash option as provided above who do not receive it ("non-cash option class members") shall receive a policy enhancement from the defendant who issued the policy. Specifically, each of the defendants shall increase the face amount of the title insurance policy issued to the non-cash option class members by an amount designed to reflect the impact of inflation as measured by the most recently available Department of Commerce Composite Construction Cost Index since January 1, 1981, to the date of the final judgment order, without additional charge.

14. If the Court does not approve the settlement described herein or any material part of it, the agreement will be terminated unless all parties agree to proceed with the agreement as modified by the Court. If the agreement is terminated or becomes null and void for any reason, the litigation shall return to the posture in which it stood as of September 30, 1993, and neither the fact nor the substance of the agreement nor the negotiations preceding it shall be used for any purpose in the litigation.

15. It is further agreed and understood that the parties to the litigation and their undersigned counsel shall endeavor in good faith to achieve the consummation of the settlement described herein through a definitive written agreement and the necessary approval of the Court.

16. The undersigned are authorized to execute this memorandum as representatives of all plaintiffs and defendants, respectively.

Dated: October 1, 1993

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First American Title Insurance Company

On behalf of all Defendants

PROOF OF SERVICE

The undersigned hereby certifies that s/he is a member of the Bar of this Court and that all parties hereto have been served with a copy of the foregoing RESPONDENTS' MOTION TO DEFER BRIEFING AND ARGUMENT by mail this 13th day of October, 1993, addressed as follows:

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